

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
STEVEN M. VALVO	:	DETERMINATION
D/B/A VALVO TRANSPORT	:	
	:	
for Revision of a Determination or for Refund	:	
of Motor Fuel Tax under Article 12-A of the	:	
Tax Law for the Period November 1, 1982 through	:	
February 28, 1987.	:	

Petitioner, Steven M. Valvo d/b/a Valvo Transport, Routes 5 and 20, Silver Creek, New York 14136, filed a petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the period November 1, 1982 through February 28, 1987 (File No. 806546).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on March 7, 1990 at 10:45 A.M. Petitioner appeared by Timothy J. Toohey, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether, as a result of a field audit, the Division of Taxation properly determined diesel motor fuel tax due.

II. Whether petitioner has shown reasonable cause and an absence of willful neglect for abatement of penalties imposed herein.

FINDINGS OF FACT

On November 13, 1987, following an audit, the Division of Taxation issued to petitioner, Steven M. Valvo d/b/a Valvo Transport, a Notice of Determination of Tax Due under Article 12-A of the Tax Law which assessed \$33,748.90 in tax due, plus penalty and interest, for the period November 1, 1982 through February 28, 1987.

Petitioner, Steven Valvo, is the sole proprietor of Valvo Transport, a trucking business engaged in hauling general commodities. During the early part of the audit period, petitioner had two or three tractor-trailer trucks on the road. Later, in or about November 1984, petitioner registered an additional 13 trucks. During the period August 1984 through October 1985, petitioner hauled pursuant to contracts with Dominion Consolidated, a Canadian trucking company, and Brown Transport, a Georgia trucking company.

On audit, the Division requested petitioner's diesel fuel purchase records. Petitioner provided very little in the way of such records and the Division then contacted two of petitioner's known suppliers of diesel fuel during the audit period. From the record, it appears that the Division learned of these two suppliers either from records which were available or through petitioner's secretary.

Upon review of the records of Lake Oil Corp. and Superior Lubricants, Inc., the two suppliers, the Division determined that petitioner had purchased 10,577 gallons of diesel fuel from Lake Oil Corp. during the period November 1982 through July 1984, and 166,279 gallons of diesel fuel from Superior Lubricants, Inc. during the period November 1985 through February 1987. Petitioner made the aforementioned purchases in bulk and therefore did not pay diesel fuel taxes to these suppliers. Petitioner consumed the diesel fuel so purchased in the course of his trucking operations. Based upon the foregoing, the Division assessed diesel fuel tax of ten cents per gallon on petitioner's diesel fuel purchases of 10,577 gallons during the period November 1982 through July 1984 and 166,279 gallons during the period November 1985 through February 1987. Petitioner conceded this portion of the assessment.

The Division had no supplier information for the period August 1984 through October 1985. The Division therefore estimated petitioner's diesel fuel purchases for this period. Using the purchase information obtained from Superior Lubricants, Inc., the Division determined that petitioner purchased 128,502 gallons of diesel fuel during 1986, or an average of 10,709 gallons per month during that year. This average gallons purchased per month figure was then applied to the 15 months comprising the period August 1984 through October 1985. The Division thus

estimated that petitioner made bulk purchases of 160,635 gallons of diesel fuel during the period August 1984 through October 1985 and assessed diesel motor fuel tax of ten cents per gallon purchased accordingly.

The Division did not make any independent efforts to determine the identity of petitioner's supplier or suppliers of diesel fuel during the period of the estimate.

Petitioner was not registered as a supplier of diesel fuel under Article 12-A of the Tax Law during the audit period and filed no tax returns under Article 12-A during that time.

During the period August 1984 through October 1985, petitioner did purchase some amount of diesel fuel at retail. Except for three receipts totalling 106.4 gallons purchased in September 1985, petitioner produced no records of any retail purchases of diesel fuel during the August 1984 through October 1985 period.

At some point during the audit period, petitioner's bulk storage capacity for diesel motor fuel increased from a capacity of about 1,000 gallons to a capacity of about 10,000 gallons.

Petitioner's highway use tax returns filed for the period August 1984 through July 1985 indicated that petitioner's vehicles travelled 653,632 New York miles during that period. Using the Division's estimate of 10,709 gallons of diesel fuel purchased per month, or 128,508 gallons over 12 months, results in a miles per gallon figure for petitioner's vehicles of 5.09 MPG for this 12-month period.

CONCLUSIONS OF LAW

A. Article 12-A of the Tax Law, specifically Tax Law §§ 282-a, 282-b and 282-c, imposes a tax of ten cents per gallon on retail sales of diesel motor fuel and also on the use of diesel motor fuel in the operation of a motor vehicle by any person who purchases or stores such fuel in bulk in New York.

B. Tax Law § 282-a classifies, in pertinent part, the following individuals as "distributors" of diesel motor fuel:

- (1) any person who makes retail sales of diesel motor fuel in New York;
- (2) any person who purchases or stores in bulk diesel motor fuel used in whole or in part to operate any motor vehicle owned, leased or operated by him;

(3) any person registered as the owner under the New York Vehicle and Traffic Law of a motor vehicle using diesel motor fuel which is operated on the public highways of New York.

C. Distributors of diesel motor fuel are required to register as such with the Division of Taxation (Tax Law §§ 282-a, 286) and are required to file returns under Tax Law § 287. Such persons are further required to keep full and accurate records showing in detail their physical inventory at the beginning and end of each month or quarterly period; purchases, retail sales, bulk sales to other distributors of diesel motor fuel; sales to persons other than distributors; and all diesel motor fuel used by the taxpayer both in the operation of a motor vehicle or otherwise (20 NYCRR 420.8[a]; see also Tax Law §§ 282-a, 286). Additionally, 20 NYCRR 420.8(b) requires distributors who are retail vendors to give purchasers who are diesel truck operators a detailed invoice setting forth the name of the purchaser and seller, number of gallons purchased, and the diesel motor fuel tax included in the sale price. Finally, 20 NYCRR 420.9(a) requires diesel truck operators who are not retail vendors or bulk users to keep a complete and accurate record of all retail purchases of diesel motor fuel.

D. Upon review of the aforecited statutes and regulations, it is clear that petitioner was a distributor of diesel motor fuel during the period at issue and that petitioner failed to register as such a distributor and also failed to file diesel motor fuel tax returns during that period. The Division was therefore authorized, pursuant to Tax Law § 288(2), to determine diesel motor fuel tax due from petitioner under Article 12-A. It is noted that petitioner has conceded liability with respect to the assessment for the periods November 1982 through July 1984 and November 1985 through February 1987. With respect to the period August 1984 through October 1985, wherein the Division estimated petitioner's diesel motor fuel tax liability, petitioner contended that his purchases during this period were made at retail with diesel motor fuel taxes included in the purchase price. Petitioner did not contend that the Division's estimate of the number of gallons of diesel fuel purchased by him during this period was erroneous.

E. The Division estimated petitioner's liability because it had no supplier information for this period. Given petitioner's failure to maintain records of his diesel motor fuel purchases as

required under Article 12-A, the Division's resort to an estimate of petitioner's fuel tax liability was proper. Moreover, under the circumstances herein, the Division's method of estimate, based upon petitioner's average monthly 1986 diesel fuel purchases, was reasonable.

F. Pursuant to Tax Law § 285-a(2), petitioner's purchases of diesel motor fuel are presumed to be subject to tax under Article 12-A and the burden of proving, as petitioner contends, that such purchases were made at retail with diesel fuel taxes included in the retail purchase price is upon petitioner.

G. Petitioner has failed to prove that his purchases of diesel motor fuel during the August 1984 through October 1985 period were made at retail. This failure of proof results from petitioner's failure to produce or maintain "full and accurate" records of his diesel fuel purchases during this period as required under Tax Law § 282-a and 20 NYCRR 420.8(a). Petitioner contended that he was required to provide such records to the companies for whom he was hauling and that he was therefore no longer in possession of his purchase records. This is an insufficient excuse. Even if petitioner was required to provide fuel purchase records to the companies for whom he was hauling, it would seem a reasonable and prudent business practice, the recordkeeping requirements of Article 12-A notwithstanding, to retain at least photocopies of one's fuel receipts. Moreover, petitioner apparently made no effort to contact the trucking companies that hired him in order to obtain his fuel records for production either on audit or at hearing.

Petitioner also contended that he had no bulk storage capacity during the period August 1984 through October 1985 and therefore could not have purchased fuel in bulk during that time. He contended that he installed a 10,700 gallon tank at his business premises in or about November 1985. With respect to this contention, it is apparent that petitioner increased his bulk storage capacity at some point during the audit period. The record, however, fails to disclose when such an increase in bulk storage capacity occurred. Petitioner's testimony, unsupported by any other evidence, is insufficient to establish his contention. Moreover, even if petitioner had established when he increased his bulk storage capacity, in the absence of his diesel fuel

purchase records, it is uncertain whether such fact would have had an impact upon the audit result herein.

H. Tax Law § 289-b(1)(a) provides for the imposition of penalties upon any person who fails to file a return or pay any tax within the time required under Article 12-A. Tax Law § 289-b(1)(c) provides that such penalty may be remitted upon a finding that such failure was due to reasonable cause and not due to willful neglect (see also, 20 NYCRR 416.3[c]).

I. Petitioner has failed to show that his failure was due to reasonable cause and not due to willful neglect. Petitioner failed to register as a distributor of diesel motor fuel, failed to file diesel motor fuel tax returns and failed to maintain records of his purchases. His failure resulted from his ignorance of his obligations under Article 12-A. Such a cause is not considered a basis for reasonable cause under the regulation (20 NYCRR 416.3[c][5]) and it does not appear to constitute reasonable cause under the facts and circumstances herein.

J. The petition of Steven M. Valvo d/b/a Valvo Transport is denied and the notice of determination, dated November 13, 1987, is sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE